

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Broadcast Localism)	MB Docket No. 04-233
)	

**COMMENTS OF THE
VIRGINIA ASSOCIATION OF BROADCASTERS**

“It is our view that the broadcast industry has matured beyond the point where it must be burdened with step-by-step instructions on the operation of stations in the public interest.”

Deregulation of Radio, Memorandum Opinion and Order, 87 F.C.C. 2d 797 (1981), ¶ 40.

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Summary

In the instant proceeding,¹ the Commission seeks comments on several proposals relating to broadcast licensee/community communication and the broadcasting of locally-oriented programming. The *Notice* includes proposals to (1) require licensees to establish, maintain, and consult with community advisory boards; (2) re-establish license renewal programming processing “guidelines”; (3) revise the unattended operation rule to require stations to be staffed during all hours of operation; (4) require stations to maintain their main studios in their communities of license; and (5) require stations to report to the Commission on the airplay of local artists and local performances. VAB opposes the adoption of the proposed new regulations.

The Commission must have a factual predicate in order to regulate, but there is insufficient factual support for the proposed rules. Evidence in the record demonstrates that broadcasters, including Virginia broadcasters, satisfy their localism obligations through a variety of methods and with a variety of tools.

No new rules are necessary to further facilitate communication between broadcast licensees and the communities they serve, and VAB opposes the adoption of any such new rules, including a requirement to establish and meet with community advisory boards. Broadcasters already engage in licensee/community communication efforts, and, in the modern age, station websites serve as an important communication tool. As was true when formal ascertainment was eliminated, stations are best left to make their own independent determinations about the most effective and efficient ways to communicate with the public, and continued regulatory flexibility

¹ *In the Matter of Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324 (2007) (“*Notice*”).

is important to these ongoing efforts. There is no substantial evidence that tends to demonstrate widespread failure in licensee/community communication. The Commission should evaluate factual data to determine whether new licensee/community communication requirements are warranted. VAB supports the Commission's efforts to further educate the public on regulatory matters.

The Commission's proposal to re-establish programming processing "guidelines" is unwarranted. Not only do the facts demonstrate that VAB member stations and broadcasters throughout the country already provide community-responsive programming, but also the Commission has failed to evaluate the existing issues/programs lists of stations to determine whether a crisis exists in the provision of locally-oriented programming. Moreover, existing Commission processes may be used to address any station's failure to provide community-responsive programming: complaints, informal objections, and petitions to deny may be filed against stations that allegedly fail to meet their localism obligations. Further regulation is, therefore, unnecessary.

VAB opposes the proposal to modify the unattended operation rule to require stations to be staffed during all hours of operation. The facts demonstrate that broadcasters who operate for periods of time pursuant to the unattended operation rule have methods in place to respond to emergency situations and provide the public with critical information. Moreover, licensee/community communication is not affected by unattended operation, and the proposed revision of the unattended operation rule does not substantially further the goals of localism.

Virginia broadcasters generally oppose the Commission's proposal to revise the main studio rule to its pre-1987 form. The current main studio rule has afforded many public interest benefits, including an increase in community-responsive programming, station co-location, and

operating efficiencies, while the proposed revision of the rule to require each main studio to be located in its community of license would cause stations to incur significant costs while not substantially furthering the goals of localism.

Finally, the proposal to require broadcasters to report on local artist airplay so that the information can be used by the Commission to evaluate a station's localism performance at license renewal time is unnecessary and impracticable. Many stations already provide access to the airwaves for local artists and performers, but station formats are not all conducive to such airplay. The proposed rule would create substantial uncertainty over critical definitional matters such as who would constitute a "local" performer and who would count as an "artist." Residence in a station's local community does not, by itself, entitle a local denizen to airplay.

In sum, the factual evidence rebuts the presumptive, non-fact-based tentative conclusions of the Commission and clearly demonstrates that the Commission's proposed localism regulatory scheme is unnecessary and unwarranted. As such, VAB respectfully requests that the Commission not adopt the proposals discussed herein.

* * *

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The Virginia Association of Broadcasters (“VAB”), through its attorneys, hereby files these comments in response to the Commission’s Report on Broadcast Localism and Notice of Proposed Rulemaking (“*Notice*”) in the above-captioned matter.² VAB is a non-profit organization representing the interests of broadcasters in the Commonwealth of Virginia. Over 200 radio stations and over 40 television stations in Virginia are members of the VAB.

I. Introduction

In 2004, in response to the Commission's *Notice of Inquiry* in the above-captioned matter, numerous individual members of VAB filed comments providing concrete examples and information concerning localism activities engaged in by Virginia broadcasters. VAB recognizes and agrees that localism is a critical component of the operation of broadcast stations. Unintended consequences will surely result from adoption of some of the localism proposals, which we believe unnecessarily restrict the manner in which broadcasters effectively relate and respond to, develop programming for, and communicate with their local communities.

² *In the Matter of Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324 (2007) (“*Notice*”).

In the *Notice*, the Commission seeks comment in several discrete areas, including whether to adopt a requirement that stations establish and consult with community advisory boards or undertake any other efforts to communicate with denizens of the local community; whether to adopt license renewal processing “guidelines” relating to certain categories of programming; whether to modify the unattended operation rules to require that stations be staffed during all hours of operation; whether to amend the main studio rule to require a station’s main studio to be located in its community of license; and whether to require stations to report on their airplay of local artists and local performances and whether to use such reports in the license renewal process.³ We address these areas below and generally oppose the Commission’s proposed regulatory requirements. In preparing these comments, VAB surveyed its membership on various issues; information contained in responses from those surveys from VAB members is included throughout these comments.

II. Comments on the Notice of Proposed Rulemaking

We applaud the Commission for its efforts to be thorough and deliberate in its consideration of a host of significant localism issues. VAB readily agrees that localism is the “bedrock” obligation of broadcasters, and that each station should, indeed, air programming that is responsive to the specific needs and interests of the local communities it serves. However, as the Commission considers these important issues, we urge the Commission to be guided by its previous commitment to strike an appropriate balance between the public interest on the one hand and necessary and effective regulation that is both *practical* operationally and *likely* to

³ The *Notice* also seeks comment on whether networks should be required to provide affiliates with an opportunity to review network programming in advance of airtime. VAB takes no position on this issue. A number of VAB’s television members are also members of associations of network affiliated stations, and those associations will be commenting on this issue.

actually fulfill the goals of localism on the other. As the Commission observed more than a quarter-century ago when it found that the competitive marketplace and advances in technology, among other things, counseled the deregulation of certain broadcast requirements:

We believe that our resolution of th[e]se issues assures that service in the public interest will continue without unnecessarily burdensome regulations of uniform applicability that fail to take into account local conditions, tastes, or desires.⁴

This statement remains as true in 2008 as it was in 1981. Later in 1981, the Commission further observed:

It is our view that the broadcast industry has matured beyond the point where it must be burdened with step-by-step instructions on the operation of stations in the public interest.⁵

The passage of time between 1981 and 2008, during which period the broadcast industry has further matured and the competitive marketplace has grown by an order of magnitude, has rendered the 1981 statement an *understatement* in 2008.

In the 1984 *Television Deregulation Order*, the Commission premised the elimination of, inter alia, formal ascertainment and programming guidelines for television stations on the “emergence of . . . new technologies, coupled with the growth in the number of television stations.”⁶ Among the “new technologies” cited were low power television and direct broadcast satellite, two services which themselves have matured over the past 20-plus years. Of course, neither satellite radio nor low power FM service had been authorized at the time of the 1980s deregulation, and those services in 2008 also make substantial contributions to the programming

⁴ *Deregulation of Radio*, Report and Order, 84 F.C.C. 2d 968 (1981) (“*Radio Deregulation Order*”), ¶ 1.

⁵ *Deregulation of Radio*, Memorandum Opinion and Order, 87 F.C.C. 2d 797 (1981), ¶ 40.

⁶ *The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 FCC 2d 1076 (1984) (“*Television Deregulation Order*”), ¶ 21.

marketplace. In addition, the growth in the number of television stations has continued since the 1980s and has increased dramatically since the *Television Deregulation Order*. In June 1983, the Commission reported a total of 1,127 television stations⁷; by 2007, the number had increased more than 55 percent to 1,759 total television stations. The growth of radio since the *Radio Deregulation Order* has been nearly identical: in 1980, there were 8,921 radio stations,⁸ and in 2007 there were 13,977 radio stations,⁹ which represents an increase of more than 55 percent. The increase in programming options and the resulting competitive marketplace cannot be swept under the rug.¹⁰

There has long been a tension between the First Amendment and the Commission's oversight of program content. We recognize fully that the Commission's role is not simply one of "traffic cop" to police technical interference between broadcast stations; the Commission is obligated to regulate in such a manner as to ensure that broadcast licensees serve the public interest, convenience, and necessity. In so doing, the Commission evaluates the *overall* public service programming provided by broadcasters. However, intrusive day-to-day and minute-by-minute oversight of program content would raise the issue of whether the Commission's regulatory regime is consistent with the First Amendment. When formal ascertainment, programming guidelines, and other regulatory requirements were eliminated in the 1980s, the Commission, itself, acknowledged the First Amendment implications of an excessively intrusive

⁷ See *Buena Vista Telecasters of Texas, Inc.*, Memorandum Opinion and Order, 94 F.C.C. 2d 625 (1983), ¶ 9 (citing *Broadcast Station Totals for June 1983*).

⁸ See *Radio Deregulation Order*, ¶ 84.

⁹ See *Broadcast Station Totals As of December 31, 2007*, News Release (Rel. Mar. 18, 2008).

¹⁰ See, e.g., Keynote Address of FCC Commissioner Robert M. McDowell, 2008 Quello Communications Law and Policy Symposium (Apr. 23, 2008) (noting that "media content . . . has exploded into exponentially more diverse and interesting programming that is now available through a dizzying array of platforms."), available at <http://www.fcc.gov/edocs_public/attachmatch/DOC-281772A1.pdf>.

regulatory scheme.¹¹ We are concerned that the nature and extent of the regulatory scheme proposed in the *Notice* would upset the balance between the First Amendment on the one hand and appropriate and warranted Commission oversight of programming on the other.

With those principles in mind, VAB offers the following comments.

A. Community Advisory Boards and Other, Informal Communication Efforts

In the *Notice*, the Commission has proposed to require radio and television stations to formally establish permanent advisory boards (including representatives of underserved community segments) in the community of license, with whom stations would consult regularly on community needs and issues. With respect to the community advisory board proposal, the Commission seeks comment on several issues, including: How members of the advisory boards should be selected or elected; how frequently licensees should be required to meet with these advisory boards; and under what circumstances a licensee should be deemed to have satisfied this requirement with its current practices.¹² The Commission also seeks comment on whether rules should be adopted to require stations to engage in other, less formal efforts, such as conducting listener or viewer surveys, holding focus sessions or “town hall” meetings, or maintaining dedicated telephone numbers, website and email addresses to foster better communication with members of the public in the local community.¹³

1. The Commission’s Proposals Are Solutions in Search of a Problem

No new rules are necessary to further facilitate communication between broadcast licensees and the communities they serve, and VAB strenuously opposes the adoption of any

¹¹ See *Radio Deregulation Order*, ¶ 106; *Television Deregulation Order*, ¶¶ 27-28.

¹² *Notice*, ¶ 26.

¹³ *Notice*, ¶ 27.

such new rules. Broadcasters already engage in activities of equal or greater value than those proposed by the Commission. As the Commission has acknowledged, the record in this proceeding is replete with examples of stations who “strive to actively ascertain the needs and interests of the communities they serve and air programming that reflects those needs and interests.”¹⁴ Indeed, as the *Notice* expressly acknowledges, “some broadcasters engage in substantial, inventive, and ongoing efforts to identify the needs and interests of the members of their communities of license as a first step in formulating and airing locally oriented, community-responsive programming that will meet those needs.”¹⁵ Accordingly, further regulation is not warranted.

Virginia broadcasters, like the vast majority of broadcasters who have commented in this proceeding, already engage in licensee/community communication efforts. A representative sample of these activities is below.

- WFLO(AM)/WFLO-FM’s website contains a “Contact Us” page to facilitate listener communication with the stations. According to the stations’ General Manager, “listeners approach us on the streets of our community frequently and express themselves. They are also encouraged to write to us or contact us through our local “Call Flo” call-in program heard Monday through Friday on WFLO(AM).”
- Monticello Media, owner and operator of six radio stations in the Charlottesville area, has conducted an “extensive and expensive research project asking the local citizens what they wanted to hear on the radio. More importantly, [the stations] are involved in the community through the Chamber [of Commerce], community organizations, charities and non-profits. [Station personnel] work with a variety of people in a variety of capacities. . . . [The WCHV] morning host and news staff [attend] community meetings.” Based on the results of the research, the licensee “invested a lot of money and changed [WWTJ’s programming format] to address the desires of the market” soon after acquiring the station.

¹⁴ *Notice*, ¶ 15.

¹⁵ *Notice*, ¶ 13. *See also id.* ¶¶ 13-15 (providing illustrative examples of broadcaster efforts).

- Real Media, Inc., licensee of WRAR-FM and WNNT-FM observes that “Our station’s reputation in the community results in many requests for interviews and public service announcements from local church, school, civic, and community groups. And many of our employees are personally involved in numerous local community efforts.”
- At WFTR and WZRV, “Almost every member of [the] staff is involved with at least one community organization, activity or philanthropic group. This allows us to constantly gather feedback from multiple source and . . . geographic regions of our coverage areas. Both the AM & FM stations serve different audiences. By actively serving with EMS, United Way, little league sports, etc. we take our market’s pulse continuously.”
- WSET-TV’s communication efforts include community surveys, community leader meetings, on air and web solicitation of comments and feedback, and speaking to community groups.
- WVIR-TV offers a dedicated email address (viewercomments@nbc29.com) and an anonymous voicemail system by which viewers may communicate with the station. The station also has a program advisory panel which meets periodically to offer suggestions.
- WSLS-TV determines the local programming needs and interests of its viewers by meeting with viewers and doing viewer feedback segments in its newscasts.
- WKDE(AM)/WKDE-FM determine the local programming needs and interests of their listeners “by getting to know community leaders and having a dialog about their needs.” The stations also use “paid research” sources and observe other media coverage to educate them on the programming needs and interests of the community.
- Lakes Media, owner and operator of WLUS-FM, WKSK-FM, WSHV, and WHLF is “continually in touch with our community through involvement (memberships and leadership positions) with local community organizations such as the Chamber of Commerce, Industrial Development Authority and the Lion’s Club. We do regular surveys of listener attitudes, and listeners are frequent on-air contributors.”
- WSWV(AM)/WSWV-FM describes its licensee/community communication activities as follows: “We are a member of our Chamber of Commerce, we air a local community calendar twice a day which lets us know what is going on in the community. We talk to our customers on a regular basis, read and communicate with our local newspaper. Watch local community discussion boards and talk to the public. We live and do business in our small community and are listeners.”

- Clear Channel Communications describes its interaction with its Virginia stations' local communities as follows: "We encourage listeners to go to our station websites. Each website features a 'contact us' button, which includes the station's email address and phone number. We solicit and receive feedback from listeners through this means. Also, station management and personnel are active in numerous community organizations such as United Way, Red Cross, Habitat for Humanity, etc. Our involvement in these groups puts us in direct contact with a broad cross-section of local leaders and citizens in all places on the economic spectrum."

All of these efforts provide opportunities for regular, valuable licensee/community communication. Clearly, broadcasters in Virginia engage in communication with their communities to ascertain the needs of and issues important to their local communities. Just as the Commission observed in 1981, stations are best left to make their own independent determinations about the most effective and efficient ways to communicate with the public—some broadcasters have chosen more formal methods while others engage in more informal methods. Continued regulatory flexibility—and not an over-inclusive, "one-size-fits-all" approach—is important to these ongoing efforts.

In addition, virtually every Virginia broadcast station that operates a website includes station contact information on the website. Contact information typically includes a street address, mailing address, telephone number, and one or more email addresses. Station websites, then, serve as a valuable tool in licensee/community communication, as the following representative examples demonstrate:

- On WRIC-TV's website the "Contact Us" webpage receives approximately 100 page views per week, which means that viewers or other members of the public are actively seeking out contact information for that television station. In addition, WRIC-TV receives approximately 170 emails from the public per week at the two email addresses that are publicized on the "Contact Us" webpage, 130 emails from the public at the email addresses of news anchors publicized on air and on the website, and 50 emails from the public at the station's "Community Events Calendar" email address.

- WKDE's website (www.kdcountry.com) contains a "Contact Us" webpage. WKDE's website averages about 3000 hits per month. WKDE's operation is too small to tally page views for its "Contact Us" webpage, but 3000 monthly website visitors have easy access to that information. On an average weekday, WKDE receives about three dozen emails at its publicized email address.
- Lockwood Broadcasting, whose headquarters are in Virginia, operates websites for its two CW affiliates (WHDF, Florence, Alabama, and WQCW, Portsmouth, Ohio). The "About Us" webpages on the stations' websites, which contain information about how to communicate with the stations, average 17 page views per week.
- WVIR-TV's "Contact Us" webpage promotes a viewer feedback email address, which typically receives between 20 and 30 emails per week.
- WWBT's "Contact Us" webpage, which receives approximately 375 page views per week, contains multiple links for viewers to use to submit programming questions, community calendar entries, weather questions, "12 On Your Side" suggestions, and to request station personnel, through the station's "Speaker's Bureau," to speak at an event.
- The "Contact" page on the WRAR-FM website receives over 200 hits per month.
- The "Contact Us" webpage on the WXBX and WYVE websites solicits listeners to contact the station by phone, fax, and email. The email address publicized on those webpages receives an estimated 250 emails per month from listeners.

Ten years ago, the Commission recognized that posting station materials on its website "can facilitate communication between licensees and their communities that can lead to better service to the public."¹⁶ The examples above bear that out—station websites make it possible for residents of a station's community to easily and quickly share ideas and opinions with stations any time of day or night, with a mere click of a computer mouse. This type of communication is far more effective, efficient, and representational than would be a formal advisory board system. The Internet has revolutionized the way humans interact and has led to a new era of

¹⁶ *Review of the Commission's Rules regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, Report and Order, 13 FCC Rcd 15691 (1998) ("1998 Main Studio Order"), ¶ 53.

intercommunication between stations and local residents. Especially in light of the prevalence of electronic access,¹⁷ it cannot reasonably be suggested that there is any present crisis in station accessibility. Indeed, the *Notice* cites no facts to suggest there is.

Notwithstanding this indisputable evidence, however, the Commission concludes that “there is some question as to whether these practices have been widespread.”¹⁸ Notably absent from the *Notice* is citation to any comment or testimony specifically describing a failure on the part of broadcasters to communicate with their local communities. In fact, the Commission’s statement in paragraph 1 of the *Notice*, that “the record indicates that many stations do not engage in the necessary public dialogue as to community needs and interests and that members of the public are not fully aware of the local issue-responsive programming that their local stations have aired” is wholly *unsupported* by the citation attributed to it in footnote 2 of the *Notice*.¹⁹ In short, the *Notice* fails to demonstrate that there is any problem for the Commission to correct by the promulgation of rules that hark back to the formalistic ascertainment communication methodology of the 1960s and 1970s. Indeed, as noted above, the evidence of adequate and regular communication between broadcasters and their communities overwhelmingly demonstrates that further regulation is not warranted.

¹⁷ The sheer volume of comments filed electronically in the instant proceeding provides evidence of decisional significance that, in the modern era, members of the public who wish to communicate with their local broadcast station are able to do so electronically. The ease and frequency of electronic communication by itself obviates the need for the Commission to mandate that stations hold periodic advisory board meetings comprised of members of certain community organizations or demographics.

¹⁸ *Notice*, ¶ 15.

¹⁹ See *Notice*, ¶ 1, n.2 (citing Testimony of Martin Kaplan, Associate Dean, Annenberg School for Communication, University of Southern California (delivered by Joseph Salzman, Associate Dean, Annenberg School for Communication) (Monterey Tr. 63-68)). Pages 63-68 of the Monterey Transcript do contain the Kaplan testimony but plainly do not support—not even by inference—the principle cited in the *Notice*.

To be sure, the *Notice* observes that “if a licensee already has formal groups in place with which it consults to determine the needs of the community, it should be deemed to have satisfied” the advisory board requirement.²⁰ And, as a corollary, the Commission seeks comment on the question of “under what circumstances a licensee should be deemed to have satisfied this requirement with its current practices.”²¹ It is plain that most of the efforts made by Virginia broadcasters described above would not qualify as consultation with a “formal” group, and it also appears that the Commission cannot describe all methods of communication that might constitute, in its opinion, a satisfactory substitution for an advisory board. The difficulty inherent in the Commission’s proposed approach—dictation of specific acceptable forms of licensee/community communication methodology—is precisely why the Commission abandoned such an approach when it eliminated the formal ascertainment process over twenty years ago and wisely afforded broadcasters flexibility and discretion in determining the needs and interests of their service communities—and it is precisely why the Commission should not now go back down that road.

The Commission’s licensee/community communication proposals, which represent a stark departure from the more flexible approach adopted by the Commission in the mid-1980s, call to mind the D.C. Circuit’s observation in the 1983 appeal of the *Radio Deregulation Order* (when the proverbial shoe was on the other foot) that “scrutiny is heightened because so many of the Commission’s actions involve some departure from prior policies and precedents” and that “such abrupt shifts in policy do constitute ‘danger signals’ that the Commission may be acting

²⁰ *Notice*, ¶ 26 (emphasis added).

²¹ *Notice*, ¶ 26.

inconsistently with its statutory mandate.”²² The record in this proceeding is filled with examples of station efforts to communicate with residents in the station’s community of license. Notably missing from the record is any evidence that could be called substantial tending to demonstrate that a failure in licensee/community communication is a widespread phenomenon. VAB is wary of the Commission’s abrupt shift in policy and encourages the Commission to scrutinize the facts before instituting its proposals.

Moreover, as discussed at length in the *Notice*, the Commission has already adopted in the *Enhanced Disclosure* proceeding several requirements that are, according to the Commission, designed to “increase public awareness of licensee localism efforts.”²³ One of the measures adopted in the *Enhanced Disclosure* proceeding is a new reporting form (FCC Form 355) which, among other things, requires each station to “indicate whether it has undertaken any efforts to determine the programming needs of its community and has designed any programming based upon those identified needs.”²⁴ Through the *Enhanced Disclosure* proceeding, then, the Commission has already adopted new tools to facilitate an evaluation of whether there is, in fact, a widespread communication crisis. Taking additional steps now, before any of the *Enhanced Disclosure* proceeding rules have actually been implemented, would be premature. At a minimum, VAB urges the Commission to put the advisory board and other, informal communication requirements on hold, pending an evaluation of the actual data that will be collected from stations pursuant to the enhanced disclosure requirements. Without first

²² *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (1983) (footnote omitted).

²³ *Notice*, ¶ 21.

²⁴ *Notice*, ¶ 21.

evaluating this data, the Commission has no factual predicate on which to rest any new licensee/community communication requirements.

2. The Rationales Underlying Elimination of Formal Ascertainment in the 1980s Are Even More Valid Today and Counsel Against Adoption of Specific Licensee/Community Communication Requirements

The Commission has indicated that the advisory board proposal is not tantamount to the former formal ascertainment process: “[N]ew efforts are needed to ensure that licensees regularly gather information from community representatives to help inform the stations’ programming decisions, but we are not persuaded that the appropriate measure should be reinstatement of the former ascertainment mandates.”²⁵ While it may be true as a definitional matter that a requirement that stations establish, maintain, and routinely meet with community advisory boards falls somewhat short of the efforts required under the former ascertainment requirements, the spirit of the advisory board proposal contravenes the very reasons cited twenty-plus years ago for the elimination of formal ascertainment and, in so doing, elevates communication ritual over programming results.

a. Micromanagement of Licensee/Community Communication Methodology Is Undesirable and Unwarranted

When the Commission eliminated its formal ascertainment rules, it “s[aw] no reason to require the broadcaster to engage in the current sort of renewal ascertainment if community issues can be determined in a less burdensome manner. Again, it is the programming and *not the process* that is the most important component of the broadcaster’s efforts, the public’s attention, and the Commission’s concern.”²⁶ Indeed, in the *Radio Deregulation Order*, the Commission

²⁵ Notice, ¶ 25.

²⁶ *Radio Deregulation Order*, ¶ 71 (emphasis added).

accurately described its formal ascertainment requirement as a “ritual[istic]”²⁷ exercise in “meaningless minutae [sic].”²⁸

We respectfully encourage the Commission to continue to embrace the policies set forth in the *Radio Deregulation Order* (and later extended to television in the *Television Deregulation Order*), namely that

broadcasters should maintain contact with their community on a personal basis as when contacted by those seeking to bring community problems to the station’s attention. *What is not important is that each licensee follow the same requirements dictating how to do so.* Accordingly, formal ascertainment will be eliminated.²⁹

Yet, the Commission now seeks to adopt a rule where each broadcast licensee in each community in every community in the nation would be compelled to follow the same requirements in order to communicate with the local community about issues, needs, and interests. The adoption of such rules represents the Commission’s micromanagement of station communication with the public—the holding of community advisory board meetings will surely become a ritualistic exercise in “meaningless minutiae.”

Any requirement that stations set up, maintain, and consult with community advisory boards or engage in other specific communication methods would directly contravene the Commission’s finding that “to the extent the licensee is compelled to follow specific procedures, resources are diverted and the opportunity for licensee discretion is foreclosed.”³⁰ As an economic matter, then, “[t]he resources which the licensee is forced to expend to satisfy

²⁷ *Radio Deregulation Order*, ¶ 56.

²⁸ *Radio Deregulation Order*, ¶ 70.

²⁹ *Radio Deregulation Order*, ¶ 69 (emphasis added).

³⁰ *Television Deregulation Order*, ¶ 53.

procedural requirements are lost from other potentially beneficial activities, such as program production in response to determined needs.”³¹ Indeed, the *Notice*’s inquiries about community advisory boards are designed to elicit details and specific procedures by which stations would be required to communicate with their communities of license. Such micromanagement by the Commission of licensee/community communication is unnecessary and unjustifiable, and, in light of the overwhelming evidence that stations already do engage in communication with their local communities, it is difficult to see how the proposals would further the goals of localism—indeed, as the Commission expressly found in 1984, such micromanagement would actually undermine one of the principal goals of localism, the production of programming responsive to community issues and needs.

b. *The Costs of the Commission’s Dictation of Communication Methodology Outweigh the Benefits*

In the *Television Deregulation Order*, the Commission found the costs of formal ascertainment to be “numerous.” At that time, the mean cost of formal ascertainment in dollars per station was estimated at several thousand dollars per year,³² and other costs, including the administrative and licensee burdens, counseled the Commission to forego further micromanagement of licensee/community communication. With respect to such costs, the Commission, in 1984, stated:

We do not believe that the benefits of the ascertainment requirements justify the costs of this procedure. While ascertainment does provide the licensee with knowledge of the community, it is clearly not the exclusive means of acquiring this knowledge, and is certainly not the most efficient. Licensees, like other citizens, are exposed to newspapers, newsletters, town meetings and other community activities, all of which provide

³¹ *Television Deregulation Order*, ¶ 53.

³² *See Television Deregulation Order*, ¶ 51.

indications of those issues that are important to the community. Broadcasters do not operate in a vacuum and, as discussed above, it is in the economic best interest of the licensee to stay informed about the needs and interests of its community. Given these considerations, as well as the continuing obligation of all licensees to provide issue-responsive programming, we believe that ascertainment requirements can now be abandoned with little or no risk of adverse effects on the programming performance of television licensees. Accordingly, in all future proceedings, the focus of our inquiry shall be upon the responsiveness of a licensee's programming, not the methodology utilized to arrive at those programming decisions. If the programming presented by the licensee satisfies its obligation, the ascertainment efforts of the station are irrelevant.³³

The *Notice* cites no evidence that the regulatory cost-benefit analysis has somehow changed. It has not. The Commission's dictation of the specifics of licensee/community communication promises to impose increased costs on stations and increased costs on the Commission itself while the incremental benefit to local communities—when stations are already engaged in ongoing communication with their communities—is speculative at best. Moreover, the Commission will simply pass these regulatory cost increases on to broadcasters by increasing annual regulatory fees on licensees.

Moreover, any new rule that mandates specific action will be accompanied by huge administrative costs and burdens. In 1984, when the Commission determined that its micromanagement of television licensee/community communication through the vehicle of ascertainment was no longer warranted, the Commission cited as a consideration in its decision the significant litigation costs incurred by the public and the Commission to enforce the ascertainment requirements. Moreover, the Commission reiterated its view at that time that "its experience with ascertainment in the adversarial arena [w]as 'litigation over trivia' . . . [that]

³³ *Television Deregulation Order*, ¶ 54.

relat[es] to mechanistic aspects of the process.”³⁴ The Commission also noted that “even without actual litigation, it is clear that substantial resources are expended to make certain that a formalistic challenge is avoided.”³⁵ The Commission’s current licensee/community communication proposals would doom over-zealous regulatory history to repeat itself: the more specific the communication mandates are, the more compliance disputes there will be for the Commission to resolve. For example, community groups or individuals who feel neglected by exclusion from an advisory board, who feel that an advisory board’s discussions were insubstantial, or who feel that a station failed to respond adequately to input provided by the advisory board will be inclined—entitled—to file complaints with the Commission, and broadcasters will expend untold resources defending such formalistic challenges. The more specific the requirements are, the more issues there will be to litigate, and the more scarce licensee resources will be allocated to legal—rather than programming—needs. The regulatory burdens simply fail to justify the perceived programming benefits.

3. VAB Supports Commission Education of the Public

The *Notice* observes that “many members of the public are unaware of these obligations of broadcasters or of the crucial role that the public can play in the Commission’s regulation of licensees.”³⁶ With respect to the issue of public awareness of broadcast regulation, we urge the Commission to continue its efforts to better educate the public about broadcast localism and the Commission’s processes.

³⁴ *Television Deregulation Order*, ¶ 52.

³⁵ *Television Deregulation Order*, ¶ 52.

³⁶ *Notice*, ¶ 15; see also *id.* ¶ 23 (noting that “many in the public do not understand the Commission’s license renewal process or, more particularly, that the procedure affords listeners and viewers a meaningful opportunity to provide their input through the filing of a complaint, comment, informal objection, or petition to deny a renewal application”).

To that end, VAB supports the Commission's efforts to update the decade-old *The Public and Broadcasting* manual and to establish a point of contact at the Commission dedicated to providing information to members of the public about how they can become involved in the Commission's processes.³⁷ The Commission, of course, has already begun this effort with material on its own website, www.fcc.gov.³⁸ Stations, of course, are also required to maintain issues/programs lists and other materials in the public file—the existing requirements are designed to facilitate the provision of more information by broadcasters to the public. These issues/programs lists are, of necessity, preceded by an ongoing ascertainment by each station of its area's local needs and interests. In light of the tools that are already available to the public, the prudent next step in assessing the effectiveness of communication between the public and broadcasters is to further educate the public and then ascertain the effect that these tools actually have on the process.

B. Renewal Application Processing Guidelines

In the *Notice*, the Commission tentatively concludes that it should re-introduce specific guidelines for the processing of broadcast renewal applications based on each station's localism programming performance. To that end, the Commission seeks comment on several issues, including whether guidelines should be expressed as hours of programming per week or as percentages of overall programming; whether guidelines should cover particular types of programming, such as local news, political, public affairs and entertainment, or simply generally

³⁷ See *Notice*, ¶ 19.

³⁸ See, e.g., *Media Bureau Releases Updated Version of "The Public and Broadcasting" and Announces That Broadcast Information Specialists Are Available for Public Inquiries*, Public Notice, DA 08-940 (rel. Apr. 24, 2008).

reflect locally-oriented programming; the nature of the categories and amounts or percentages; and how “local programming” should be defined.³⁹

Significantly, in the *Notice*, the Commission acknowledges that broadcasters are providing “substantial amounts” of local-oriented programming.⁴⁰ According to the Commission, “the record also reveals that others feel that broadcasters are not complying with their obligation, as public trustees, to air sufficient programming that is responsive to local needs and interests.”⁴¹ Regulation, to be meaningful, must be based on facts. Regulation based on nothing more than the “feelings” of advocacy groups or federal regulators is inherently arbitrary and capricious. Even if there is disagreement over whether broadcasters air sufficient local-oriented programming to meet their obligations to serve the needs of their local communities, any such disagreement does not warrant the adoption of processing guidelines. Factual support is required. We, therefore, respectfully oppose the adoption of any localism programming license renewal guidelines.

1. Existing Issues/Programs Lists Provide the Best Evidence of Whether Processing Guidelines Are Warranted

The first step in resolving the disagreement over the sufficiency of community-responsive programming is not for the Commission to adopt “endgame” guidelines; rather, the first step is to evaluate whether stations’ programming is reasonably responsive to community needs and issues. In the course of deciding whether to deregulate television some 25 years ago, the Commission undertook such an evaluation.⁴² Notwithstanding the *Notice*’s tentative

³⁹ See *Notice*, ¶¶ 40, 124.

⁴⁰ See *Notice*, ¶¶ 31-33.

⁴¹ *Notice*, ¶ 34.

⁴² *Television Deregulation Order*, ¶ 8 (“[O]ur review of the record and *study of station performance* persuades us that licensees will continue to supply informational, local and non-
(continued . . .)

conclusion that programming guidelines are necessary, we note that the Commission has not, in this proceeding, truly undertaken to determine whether there is, in fact, a significant number of stations providing community-responsive programming. Instead, the Commission has given more weight to the conclusory protestations of some commenters who assail broadcast programming even in the face of record evidence that plainly contradicts such a view.

Significantly, the Commission acknowledged in the *Notice* that not all broadcasters are failing to meet their obligations,⁴³ a fact that is further borne out by the following representative sample of local-oriented programming aired by Virginia stations.⁴⁴

- Each station in Cox Radio's four-station cluster airs weekly the locally-produced program *Focus Richmond* that concentrates on issues immediately relevant to local listeners. This program gives attention to news trends and events in the Richmond metro area.
- WVIR-TV produces numerous community-responsive programs, including *The Scripps Spelling Bee*, *The Dogwood Festival Parade*, and *The Children's Medical Center Telethon*. The station also telecasts live from various civic and charitable events and offers free five-minute opportunities to political candidates during election season.
- WKDE(AM) and WKDE-FM broadcast interviews of local spokespeople and leaders from various community and civic groups.

entertainment programming in response to existing as well as future marketplace incentives, thus obviating the need for the existing guidelines." (emphasis added)).

⁴³ See *Notice*, ¶ 40 ("We tentatively conclude that we should reintroduce renewal application processing guidelines that will ensure that all broadcasters, not just the ones we heard from in this proceeding, provide some locally-oriented programming."). While VAB acknowledges that there may be stations here or there that do not air local-oriented programming—a principle that, as with every facet of regulatory violation, is unremarkable—the Commission already has mechanisms and procedures for dealing with such stations, which are discussed below in Section II.B.4. The Commission's proposal to adopt generally applicable regulations in order to address the (in)action of a few stations is unsustainable. This over-inclusive, "one-rotten-apple-spoils-the-bunch" regulatory approach cannot survive judicial scrutiny.

⁴⁴ The list of community-responsive programming aired by Virginia broadcasters does not include local, regional, or national news or Public Service Announcements (PSAs), some of which are aired nearly universally on numerous stations throughout Virginia.

- Royal Broadcasting, Inc., licensee of WFTR and WZRV, airs *The Valley Today*, a local, live public affairs program that features segments about community organizations, area tourism, education, local and regional business matters, and philanthropic and charitable endeavors. Twice per month on WFTR local high school students are invited to direct and produce their own public affairs program aimed at local high school students.
- Every weekday morning, WFLO(AM) airs *Call Flo*, a 45-minute program that focuses on local issues and events throughout the listening area and serves as a venue for local government officials, political candidates, local talent, and members of the community at large to express themselves and share their ideas. *Call Flo* often features interviews with local newsmakers. WFLO also airs community calendar notices throughout the day and WFLO(AM) and –FM have been known to interrupt programming to announce a local lost pet or animal.
- Each of the six stations in Monticello Media’s Charlottesville area cluster weekly airs locally-produced *Charlottesville This Week*, which features, inter alia, interviews with local community leaders. WCVH’s weekday morning show addresses community issues on a daily basis, including affordable housing, education, elections, and municipal budgets.
- Real Media, Inc.’s two stations WNNT-FM and WRAR-FM air House of Delegates reports to apprise the public of the goings-on in the state legislature.
- Easy Radio, Inc., licensee of WMXH-FM and WRAA broadcast *Speak Out*, a weekly, local community call-in show. Local issues are also discussed at the top of the hour each weekday at 7 am, 8 am, 5 pm, and 6 pm.
- WSWV(AM)/-FM air long-form special programming on a quarterly basis to address community issues, which have recently included a debate among candidates for the school board and the sheriff discussing safety issues such as school zones.
- Three Rivers Media Corporation, licensee of WXBX, WYVE, and WLOY, airs public affairs programming throughout each week at various intervals. *About Books* relates to the county library system (airs the 2nd Thursday of each month, twice per day); *Access WCC* provides information about Wytheville Community College (airs the 3rd Friday of each month, twice per day); *Talk of the County* centers around issues of Wythe County (airs the 1st Friday of each month, twice per day); *Talk of the Town* covers relevant topics presented by the Rural Retreat Town Council (airs the Friday after the 2nd and 4th Tuesday of each month, twice per day); *Talk of the Schools* discusses important issues/concerns of the Wythe County School Board, as well as any matters affecting any/all schools in Wythe County (airs the 1st Thursday of each month, twice per day).

- WUSQ-FM's morning show includes a daily "Community Microphone" segment that features local guests. The local sheriff records a "crime of the week" spot each week, which is featured during prime commercial inventory—this segment has helped local law enforcement solve several local crimes.
- WLQM(AM)/-FM twice monthly airs *Franklin Today*, featuring the Mayor of Franklin and focusing on a variety of topics and issues relevant to the residents of the community of license, Franklin, Virginia. Topics include economics, schools, affordable housing, and local industry.

Meanwhile, the Commission has far better tools at its disposal than the comments submitted in this proceeding to determine whether, in fact, there is a crisis in localism programming: radio and television issues/programs lists. Stations have been required to maintain issues/programs lists for over two decades, during which time the Commission has not sought to evaluate them *en masse* even a single time. And now, instead of evaluating these materials that stations are already required to maintain, the Commission has proposed to adopt processing guidelines without even evaluating the sufficiency of community-responsive programming that is described in quarterly issues/programs lists. The fruit lies literally wasting on the vine. Without first evaluating issues/programs lists (or some representative sample thereof), the Commission has no rational basis for elimination of its current flexible localism programming scheme in favor of a guidelines approach. Doing so would amount to arbitrary and capricious rulemaking.⁴⁵ The *Notice*'s proclivity for conclusory rhetoric is regrettable. If there is truly an issue here, the Commission has an Enforcement Bureau to pursue those broadcasters who fail to live up to their public interest responsibilities.

⁴⁵ The arbitrariness and capriciousness is further underscored by the fact that the Commission recently adopted a new form (Form 355) and quarterly filing requirement to collect information about several subsets of localism programming—again, without ever having reviewed broadcast issues/programs lists. Before the Commission has taken the opportunity to evaluate any station's Form 355—indeed, before the Commission has even released Form 355 for use—to determine the sufficiency of localism programming, the Commission has concluded that processing guidelines are necessary. In so doing, the Commission is putting the cart before the horse.

Notwithstanding the factual evidence, the Commission leapt to propose an industry-wide solution to an alleged problem that has never actually been investigated or documented despite the existence of significant—indeed definitive—factual evidence in the form of issues/programs lists sitting in the public file of every compliant station in the country. That this evidence would be valuable, if not dispositive, in an analysis whether stations are reasonably airing community-responsive programming is plain from numerous Commission decisions. For example, in a decision released in February 2008 (after the release of the *Notice*), the Commission, in sanctioning a broadcast station in connection with its failure to maintain the issues/programs list from Second Quarter 2001, found that “‘issues/programs’ lists are a significant and representative indication that a licensee is providing substantial service to meet the needs and interests of its community.”⁴⁶ It is beyond arbitrary and capricious for the Commission, when sanctioning stations, to put such great weight on the importance of issues/programs lists as a tool for demonstrating a station’s community-responsive programming performance but to altogether ignore their existence when evaluating whether there is a widespread failure among stations to provide local-oriented programming and whether the implementation of more burdensome regulations is necessary.

This lack of factual analysis is of considerable moment: the Commission, as a matter of law, is obligated to give “reasoned consideration to all the material facts and issues.”⁴⁷ As an administrative agency, the Commission “must engage in reasoned decision-making, articulating with some clarity the reasons for its decisions and *the significance of facts particularly relied*

⁴⁶ *In re WIWS(AM), Beckley, WV*, Letter from Peter H. Doyle to Mr. R. Shane Southern, DA 08-365 (Feb. 14, 2008), ¶ 6 (unnumbered).

⁴⁷ *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 49 (D.C. Cir. 1979).

on.”⁴⁸ The facts demonstrate that broadcasters both communicate with their local communities and air community-responsive programming; the facts do not demonstrate that additional regulation is necessary to ensure the continued production of local-oriented programming.

2. The Rationales Underlying the Elimination of Programming Guidelines in the 1980s Remain Valid

Prior to 1981 (for radio) and 1984 (for television), Commission rules required broadcasters to meet certain “guidelines” for the broadcast of non-entertainment programming in order for a station’s license renewal application to be processed at the Bureau level pursuant to delegated authority. Stations failing to meet the “guideline” amounts of non-entertainment programming had their license renewal applications subjected to review by the full Commission.⁴⁹ In abandoning the “guidelines” for radio in 1981, the Commission found that the guidelines were “of limited effect and . . . of no substantial utility.”⁵⁰ In deregulating commercial television in 1984, the Commission described the amounts of guideline programming as having been “arbitrarily set.”⁵¹ At that time, the Commission’s

decision to eliminate the processing guidelines [wa]s based on two fundamental considerations. First, our review of the record and study of station performance persuades us that licensees will continue to supply informational, local and non-entertainment programming in response to existing as well as future marketplace incentives, thus obviating the need for the existing guidelines. . . . Second, our re-examination of the current regulatory scheme reveals several inherent disadvantages, including: potential conflicts with Congressional policies expressed in the Regulatory Flexibility Act and the Paperwork Reduction Act, imposition of burdensome compliance costs, possibly unnecessary infringement on the editorial discretion of broadcasters, and distortion of the

⁴⁸ *Id.* (emphasis added).

⁴⁹ See, e.g., *Radio Deregulation Order*, ¶ 20.

⁵⁰ *Radio Deregulation Order*, ¶ 24.

⁵¹ *Television Deregulation Order*, ¶ 19.

Commission's traditional policy goals in promulgating and monitoring programming responsibilities.⁵²

With respect to the first consideration identified by the Commission in 1984, VAB believes that stations have continued to supply informational, local and non-entertainment programming in response to marketplace incentives. With respect to the second set of considerations identified by the Commission in 1984, VAB observes that nothing material has changed in the past 25 years—thus, the Commission must now, as a matter of law, provide evidence to overcome all of those “inherent disadvantages” in order to re-establish license renewal programming guidelines. This, the Commission has not done.

At the time of deregulation, the Commission correctly observed that the proliferation of broadcast stations and other sources of programming created an environment in which market forces would naturally operate to ensure that stations continue to serve the public interest.⁵³ That fundamental premise, which was true more than 25 years ago, remains true today. Indeed, in the modern era, the proliferation of media sources continues unabated.⁵⁴ If sufficient competitive market pressure existed 25 years ago, then surely it exists to an even greater degree today.

Moreover, in 1984, the deregulation of commercial television stations was premised, in part, on multivariate regression analyses that demonstrated that the processing guidelines had little effect, if any, on stations' performance under the then-existing guidelines.⁵⁵ To VAB's

⁵² *Television Deregulation Order*, ¶ 8 (citations and footnote omitted).

⁵³ See *Television Deregulation Order*, ¶ 15; accord *Radio Deregulation Order*, ¶ 34 (“We believe that given the competition and number of stations now present in the radio broadcasting field, there is even less of a need now than there was twenty years ago for us to articulate any ‘rigid mold or fixed formula for station operation.’ Rather, stations should be guided by the needs of their community and the utilization of their own good faith discretion in determining the reasonable amount of programming relevant to issues facing the community that should be presented.”).

⁵⁴ See *supra* note 10.

⁵⁵ See *Television Deregulation Order*, ¶ 18.

knowledge, no statistical evidence has been presented to the Commission that would demonstrate a need to re-regulate at this time.

Finally, the reinstatement of any processing guidelines would create a *de facto* requirement that stations maintain programming logs—without the maintenance of programming logs, stations would have no evidence to support their representations of compliance with the guidelines. When the Commission eliminated the requirement that stations maintain programming logs in 1981 (for radio) and 1984 (for television), the observation was accurately made that “the paperwork burden of the logs . . . seems just too great to be taken lightly.”⁵⁶ Of course, in 2008 many broadcasters do maintain some form of program-related logs. However, as the Commission correctly noted in 1981:

There is a difference, however, between records kept voluntarily in format designed for utility, and records kept pursuant to a strict and detailed government regulation. The difference is particularly striking when it is emphasized that a failure to maintain the former may simply result in some lost billings, while failure to maintain the latter can result in a fine, a hearing, or even loss of license.⁵⁷

In short, then, the “guidelines” issues on which the Commission has sought comment in the *Notice* are issues that were directly addressed in the 1981 and 1984 Deregulation Orders. Significantly, in the intervening years the Commission has not found a single instance of market failure and, as recently as 2007, has rejected a conclusory challenge alleging market failure in the context of the provision of local electoral programming.⁵⁸ There is simply no evidence of

⁵⁶ *Radio Deregulation Order*, ¶ 101.

⁵⁷ *Radio Deregulation Order*, ¶ 104.

⁵⁸ See *In re Petitions to Deny Filed by Chicago Media Action and Milwaukee Public Interest Media Coalition*, Letter Ruling, 22 FCC Rcd 10877 (2007) (rejecting petitioners’ contention that “the paucity of coverage of local elections . . . is inconsistent [with] the principle of localism” and finding that “[q]uantity is not necessarily an accurate measure of the overall responsiveness of a licensee’s programming”).

programming market failure. Instead, the number of sources of non-entertainment programming has increased exponentially in the last quarter century. Re-imposition of processing “guidelines” is factually unjustifiable.

3. Processing Guidelines Threaten the Ability of Stations to Best Serve Their Communities and Listeners and Viewers

The proposal to institute (or, more accurately, *re-institute*) processing guidelines calls to mind the D.C. Circuit’s admonition that a “goal of making a single station all things to all people makes no sense. It clashes with the reality of the radio market, where each station targets a particular segment: one pop, one country, one news radio, and so on.”⁵⁹ Yet, that is precisely what programming guidelines would effectively do: cause each station to respond to its local community by providing prescribed kinds and amounts of certain categories of programming—a classic example of trying to make each station all things to all people.

Moreover, some station formats—particularly in the radio context—do not lend themselves to a guidelines processing mechanism. It is imperative that a sports talk station, for example, have flexibility about the type of programming it uses to discuss issues of importance to the community. Listeners of a sports talk station in Charlottesville, Virginia, are unlikely to tune into that station for electoral programming segments, but they are likely to tune in to satiate their interest in collegiate athletics issues. Similarly, listeners in the Blacksburg, Virginia, area probably will not tune in to a sports talk station for commentary on local town council meetings, until those meetings affect the zoning of a new college athletics facility. No sports talk station should have its license renewal processed by reference to any “guideline” amount of electoral programming.

⁵⁹ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355-56 (D.C. Cir. 1998).

Similarly, a religious broadcast station should not have its license renewal judged with reference to the amount of local news programming it provides. Religious stations routinely address numerous issues of importance to their service communities—issues relating to spirituality, morality, and family. These issues, important to communities throughout Virginia, can be and are addressed in myriad ways, including through sermon, song, and discussion without being presented as “local news” or as part of any other program category that would fit neatly into “guidelines” nomenclature.

In short, a guidelines approach would completely ignore the myriad ways in which stations can effectively serve their communities with local-oriented programming even while choosing not to air some “categories” of programming. Accordingly, VAB opposes the Commission’s proposal to adopt programming “guidelines.”

4. Adequate Tools Already Exist to Monitor Localism Programming

In the *Radio Deregulation Order*, the Commission observed that there may be “isolated cases” where broadcasters are insufficiently responsive to the community in the broadcasting of programming in the public interest. As the Commission stated then (and as holds true now):

If a station is not addressing issues, citizens will be able to file complaints or petitions to deny. We continue to encourage citizens to meet with their local broadcasters to discuss their concerns, but if they do not receive satisfaction, they should take the complaint or petition to deny routes. These long standing channels will allow the Commission to continue to monitor the performance of licensees, and indeed will better indicate the responsiveness of licensees than do fixed guidelines.⁶⁰

⁶⁰ *Radio Deregulation Order*, ¶ 109; accord *Television Deregulation Order*, ¶¶ 3, 30; *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Memorandum Opinion and Order, 104 F.C.C. 2d 358 (1986), ¶ 10 (“Citizen complaints and petitions to deny remain available as monitoring mechanisms.”).

These avenues, including review of community-responsive programming in issues/programs lists, remain available to local residents. If anything, the burden on citizens to file a complaint or informal objection has decreased substantially in the modern age because they can be filed over the Internet on the Commission's website.⁶¹ With the rise of the Internet, citizens are ever more able to file complaints, petitions to deny, and informal objections against stations and license renewal applications. Citizens have more tools by which to communicate with stations, and, as noted elsewhere in these comments, stations report high levels of communication from local listeners and viewers.

To the extent citizens are not taking advantage of these avenues—and VAB is unaware of the frequency with which citizens do so—the answer plainly is not to require broadcasters to comply with “arbitrary”⁶² guidelines or to play a meaningless bureaucratic “numbers game.”⁶³ Instead, the answer is to further educate the public about the Commission's processes—a task which the Commission is undertaking and which Virginia broadcasters support.

For evidence that the current processes work, the Commission need look no further than its decision rendered less than one year ago in *In re Petitions to Deny Filed by Chicago Media Action and Milwaukee Public Interest Media Coalition*, Letter Ruling, 22 FCC Rcd 10877 (2007). There, an *ad hoc* coalition of viewers and civic organizations filed petitions to deny against some 19 television stations' license renewal applications on the grounds that the stations collectively failed to meet their public interest obligations by allegedly failing to provide sufficient local election news coverage. While many conclusory and factually unsupported

⁶¹ The Commission has an entire section of its website designed for consumer use (www.fcc.gov/cgb/consumers.html) and a multi-layered webpage (www.fcc.gov/cgb/complaints.html) devoted to the filing of complaints by consumers with little more than the click of a computer mouse.

⁶² *Television Deregulation Order*, ¶ 19.

⁶³ *Radio Deregulation Order*, ¶ 52.

assertions were made, such were ultimately found wanting. Although the Commission ultimately denied the petitions, care was taken by the Commission to carefully consider all facts: “We will exercise our discretion and consider all of the pleadings, and allegations raised therein, that have been filed by the parties.”⁶⁴ We respectfully encourage the Commission in *this* proceeding to consider all the facts—which demonstrate that sufficient tools and processes already exist to address the few isolated cases of inadequate community-responsive programming.

C. Remote Station Operation

The *Notice* references that, in another proceeding, the Commission is currently considering whether changes should be made to the rules governing remote operation of radio stations, including a requirement that station personnel be on-site during all hours of station operation. The Commission seeks comment on whether such changes are advisable in the television context.

VAB filed comments in the *Digital Audio Broadcasting* proceeding urging, in relevant part, that the Commission take no action at this time with respect to the remote station operation rules.⁶⁵ VAB reiterates that position here. At this time, the Commission should take no further action with respect to the remote station operation rules both because they are serving their stated purpose and because elimination of them would not substantially further any localism goals or policies.

⁶⁴ *In re Petitions to Deny Filed by Chicago Media Action and Milwaukee Public Interest Media Coalition*, Letter Ruling, 22 FCC Rcd 10877 (2007), n.2.

⁶⁵ *See Joint Comments of the North Carolina, Ohio, and Virginia Associations of Broadcasters*, FCC Docket No. 99-325 (filed Oct. 15, 2007), p.9.

It is well-established that all broadcast stations are required to have management and staff presence on site at the main studio during regular business hours. The rationale for such studio presence is that it facilitates a station's ability to serve the needs and interests of the residents of the station's community of license during regular business hours.⁶⁶ We concur with the logic of the studio presence requirement but respectfully suggests that no similar rationale exists to support a requirement that stations be staffed during *all* hours of operation.

The *Notice* suggests that there are two reasons why the unattended station operation rules should be revisited. First, the Commission suggests generally that “[r]equiring that all [broadcast] stations be attended can only increase the ability of the station to provide information of a local nature to the community of license.”⁶⁷ Second, the Commission suggests specifically that “in the event of severe weather or a local emergency, such a requirement that all operations be attended may increase the likelihood that each broadcaster will be capable of relaying critical life-saving information to the public.”⁶⁸ While the Commission’s “intuition” and “hunches” may seem sensible, they are not borne out by the facts.⁶⁹ The operational reality present at most stations and the regulatory burden that such a rule would impose would actually result in less—not more—local programming.

⁶⁶ See, e.g., *American Family Association*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 14072 (2004), ¶ 9 (“A meaningful management and staff presence exposes stations to community activities, helps them to identify community needs and interests and, consequently, helps them meet their community service requirements.”).

⁶⁷ *Notice*, ¶ 29.

⁶⁸ *Notice*, ¶ 29.

⁶⁹ Commission decisions cannot be premised on “administrative feel.” *Central Florida Enterprises, Inc.*, 598 F.2d at 50. To the contrary, they “must supply a reasoned analysis explaining [a] departure from its prior policies.” *Monroe Communications Corp. v. FCC*, 900 F.2d 351, 357 (D.C. Cir. 1990).

First, as the Commission recognized in 1995, technological advances have supplanted attended operation, making the need for a broadcast transmitter duty operator “superfluous.”⁷⁰ The nexus between attended operation and community-responsive programming is factually tenuous, at best, and unproven, at worst. The unattended operation rules principally govern the technical side of station operations. Indeed, a station could be operating pursuant to the unattended operation rules yet still have staff present at the studio—for example, a receptionist and sales manager could be present during regular business hours but have little or no knowledge of the technical side of station operations, which are being carried on from a distant location. In fact, Lockwood Broadcasting, whose operations are headquartered in Virginia, operates its television stations in Alabama and Ohio for periods of time from a master control hub located in Richmond, Virginia. Lockwood is not alone. Many other television companies operate in this fashion using technical operation “hubs.” Each station maintains a proper and compliant main studio (including management and staff presence) in its own market, and the station staff in each of those markets maintains contacts in the relevant communities. Requiring each of Lockwood’s television stations to have a master control operator on site during all hours of operation would in no way increase the local involvement and responsiveness of those stations. In fact, the technical reliability of the stations would likely *decrease* by such a requirement because each of the Lockwood main studios is located in a small, remote community where it is difficult to find and retain master control operator personnel—the difficulty in finding qualified MCO personnel could cause the stations to have to cease operation during overnight periods. By operating its stations during the overnight from its Richmond hub and by monitoring the stations remotely

⁷⁰ *Amendment of Parts 73 and 74 of the Commission’s Rules to Permit Unattended Operation of Broadcast Stations and to Update Broadcast Station Transmitter Control and Monitoring Requirements*, Report and Order, 10 FCC Rcd 11479 (1995) (“*Unattended Operation Order*”), ¶ 3.

24/7, Lockwood has a greater level of assurance that its stations' operations continue to maintain technical compliance.

Second, the remote station operation rules have been in effect for barely more than a decade and, so far, have lived up to the Commission's goal of "providing for the most flexible, cost-effective station operation possible."⁷¹ Any justification for rolling back the unattended operation rule, then, would have to overcome the operational value inherent in the rule. It should be noted that some Virginia television stations do not rely in any significant way on remote station operation. For example, WSET-TV, WFXR, WRIC-TV, and WWBT have staff on duty at all times of station operation. For those and other stations that do not rely on the unattended operation rule, then, any Commission rule requiring station staff to be present during all hours of operation would be superfluous. For other television stations in Virginia, however, the proposal would present significant economic issues, as it does for many radio licensees.

Virginia radio stations, such as the two owned and operated by Real Media, Inc., the two owned and operated by Easy Radio, Inc., the two owned and operated by Colonial Broadcasting Company, Inc., two of the three owned and operated by Three Rivers Media Corporation, and the four owned and operated by Lakes Media Holding Co., routinely rely on remote station operation techniques, especially during overnight periods when personnel are not at the station. Consistent with their localism obligations, each of these broadcasters has provided local law enforcement and/or emergency management contact information including cell phone or home phone numbers for key station personnel so that law enforcement and emergency management can contact them at any time, whether the station is attended or unattended. In the case of Three Rivers Media Corporation,

⁷¹ *Unattended Operation Order*, ¶ 8.

emergency alert personnel have been given our 24 hour emergency telephone number along with a code, so that we are accessible in the case of an emergency issue. Station personnel are at the station within 5 minutes of notification. The list of emergency alert personnel includes Emergency Management, State and City Police, County Sheriffs Department, and all schools and colleges within a five county area.

Similarly, for Royal Broadcasting, Inc.:

Every six months, the programming & operation staff of both stations [WFTR and WZRV] meets with Emergency Management from the County to update phone numbers, cell numbers and other contact information, in the event of an after-hours emergency. In addition, town and county managers and staff are regular guest[s] on our live/local community service programming, updating the audience on procedures and policies. . . . At least three [station] staff members live within 5 minutes of the main studio.

Likewise, Piedmont Communications, Inc. is the licensee of four stations in the Orange, Virginia, area, one of which serves as the area's EAS LP1 station. A major railway cuts through the heart of this area, and a nuclear power plant is nearby. During periods of unattended operation, the licensee has devised a plan to communicate with the public about relevant emergencies. Local emergency management knows how to get in touch with the licensee's President/General Manager at any hour, and he, in turn, contacts other station personnel as needed to staff the station to provide information to the public. That way, the stations are fully capable of providing critical emergency information to the public even during periods that the stations operate unattended.

A phone call is a phone call—if a station is attended, emergency management must call the station to alert the staff of an emergency situation; when broadcasters provide law enforcement with home phone and cell phone numbers, law enforcement calls those numbers (instead of the station phone number) to alert the station staff of an emergency situation. Having personnel at the station would not alter the need for the phone call from law enforcement or

emergency management. In that regard, then, altering the unattended operation rule to require stations to have staff on duty at all times of operation would not add any capabilities that are not already capable of being addressed by other, less burdensome means.

Third, the Emergency Alert System (“EAS”) is the primary method by which many broadcasters, particularly broadcasters with smaller or no news departments, receive and disseminate emergency information to the public. EAS equipment is designed to function automatically, and the Commission recognized as much in 1995 when the unattended operation rules were adopted.⁷² Virginia broadcasters who use unattended operation technology receive and disseminate emergency information to their listeners and viewers through EAS. Having personnel on site during those periods would not change the distribution mechanism for these stations—emergency information would still be broadcast from the station’s EAS equipment.

Finally, some stations simply cannot afford to hire additional staff to comply with the proposed rule. For example, BC Broadcasting Company, Inc., which operates 24/7, currently staffs its stations 86 hours per week (which constitutes 95 hours of payroll). The licensee estimates that its payroll would increase by approximately 40 percent if it were required to staff its stations 168 hour per week. The licensee’s president observes that

[i]f they require 24 hour coverage, it will probably break us. We do not have the cash flow to cover the payroll it would require. . . . This would increase our payroll expense about 40% which would close our doors. The population of our county is under 25,000 people and declining which means there is not enough advertising business to cover the added expense.

Any regulatory requirement that would cause a station to provide less service is *prima facie* not in the public interest. Yet that is precisely the effect that the proposed staffing requirement

⁷² See *Unattended Operation Order*, ¶ 14 (“The new EAS . . . is specifically designed for unattended operation and does not require human involvement.”).

would have: it would cause broadcasters—especially small market operators—to make the hard decision to actually cease broadcasting overnight. This loss of programming service would result in the concomitant loss of EAS alerts during the off-air periods. When the Commission instituted its unattended operation rules, it specifically recognized that “smaller broadcasters . . . stand to benefit the most from the reforms at issue in this proceeding.”⁷³ It is those same smaller broadcasters whose operations would be disproportionately affected by the proposed rule, and, of course, in light of the relative costs and benefits, it is the public who stands to lose the most should the proposal be adopted.

In short, a requirement that stations be staffed at all times during operation simply would not serve any goal asserted by the Commission, and instead could prove to be contrary to the public interest where competent technical personnel are unavailable and where stations cease overnight operation because the additional expense of staffing the station is prohibitive. With respect to the unattended operation rules, the Commission should carefully balance the regulatory burden on stations with the stated goals and perceptible benefits before requiring personnel on site at all times of operation.

D. Main Studio Rule

In the *Notice*, the Commission seeks comment on whether to revert to the former requirement that station main studios be located in the station’s community of license. In 1987 and 1998, the Commission appropriately provided broadcasters with greater flexibility in the location of their main studios: the current main studio rule permits a station to maintain its main studio within the principal community contour of any station licensed to the same community of license or within a 25 mile radius from the reference coordinates of the center of the community

⁷³ *Unattended Operation Order*, ¶ 8.

of license.⁷⁴ The *Notice* queries (i) whether the location of a main studio in a station's community of license would encourage broadcasters to produce locally originated programming and (ii) whether "accessibility of the main studio increases interaction between the broadcast station and the community of service."⁷⁵ The answer to both questions is "no." The questions reflect an outdated view of the means by which stations communicate with their audiences.

More than a half-century ago, long before the age of the Internet, the Commission

stated that "a station cannot serve as a medium for local self expression unless it provides a reasonably accessible studio for the origination of local programs." The correlation between the location of the studio and the furnishing of local service also was found in the television context to support the main studio location rule for television broadcast stations.⁷⁶

Then, approximately two decades ago, the Commission found that several factors

warrant[ed] reevaluation of the rules, [including] the technical advances in the production and transmission of programming which have taken place during the last 35 years, *the uncertainty as to whether accessibility of the main studio increases interaction between residents and the station* and the substantial costs which may be imposed by the [pre-1987] rules.⁷⁷

⁷⁴ See 47 C.F.R. § 73.1125.

⁷⁵ *Notice*, ¶ 41. As an initial matter, it is unclear whether the Commission's reference to the "community of service" is intended to be coextensive with a "community of license" or whether "community of service" is a phrase intended to cover the broader geographic service area of a station (which can range many miles and counties beyond a station's "community of license"). For purposes of these comments, VAB assumes that the Commission's use of the "community of service" nomenclature is intended to be synonymous with "community of license."

⁷⁶ *Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, Report and Order, 2 FCC Rcd 3215 (1987) ("1987 Main Studio Order"), ¶ 6 (quoting *Promulgation of Rules and Regulations Concerning the Origination Point of Programs*, 43 F.C.C. 570 (1950); and citing *Television Main Studio Location*, 43 F.C.C. 888 (1952)).

⁷⁷ 1987 Main Studio Order, ¶ 12 (emphasis added).

A mere ten years ago, the Commission adopted the current version of the main studio rule and provided stations with additional flexibility in the location of their main studios. In so doing, the Commission

set forth two goals. Our first goal is to strike an appropriate balance between ensuring that the public has reasonable access to each station's main studio and public file and minimizing regulatory burdens on licensees. Our second goal is to adopt clear rules that are easy to administer and understand.⁷⁸

The *1998 Main Studio Order* positioned the Commission to accomplish both of its stated goals, and many stations nationwide and in Virginia have made significant operational and financial decisions in reliance on the main studio rule. Because a reversion to the pre-1987 main studio rule would (i) undermine both of the goals set forth in the *1998 Main Studio Order*, (ii) fail to perceptibly serve any substantial localism goals, and (iii) result in massive and unnecessary regulatory costs to be incurred by stations (and disproportionately by radio stations), VAB strongly opposes any revision to the main studio rule and particularly a revision that would “turn back the clock” a half century.

The third paragraph of the *1998 Main Studio Order* neatly encapsulates the various rationales for the Commission's previous liberalization of the main studio rule:

At one time, all broadcasters were required to maintain their main studios in their communities of license. In 1987, we relaxed the rule to permit a station to locate its main studio outside its community of license provided it is within the station's strongest signal area—the principal community contour. In doing so, we noted that the role of the main studio in the production of programming had diminished over the years, that community residents often communicate with stations by telephone or mail rather than visiting the studio, and that the growth of modern highways and mass transit systems had reduced travel times. We further observed that the revised rule would allow broadcasters to

⁷⁸ *1998 Main Studio Order*, ¶ 5.

obtain certain efficiencies, such as co-locating a station's studio at its transmitter site or moving the studio to lower cost areas. These factors persuaded us that relaxing the rule would provide broadcasters greater flexibility while at the same time ensuring that their main studios continued to be reasonably accessible to the communities they serve.⁷⁹

None of these rationales has weakened or been invalidated by the passage of time, and most of them have grown stronger in their significance. As a result, reversion to the pre-1987 rule is not only unwarranted but also unjustifiable as a matter of administrative law.

1. Accessibility and Communication Are Not Compromised By the Current Main Studio Rule

In 2008, the world communicates very differently than it did even just a decade ago. In 1998, the Commission found the prevalence of telephone and mail communication and improved highways to be of decisional significance. Today, both telephone and mail take a back-seat to the ease and instantaneousness offered by electronic communications techniques such as email, text messaging, and website feedback forms. The number of communications that stations receive on a daily, weekly, and monthly basis is simply unprecedented. As discussed above in Section II.A, most Virginia broadcast stations that operate a website include contact information on the website—and listeners and viewers actually put this information to use and contact stations to make suggestions, register complaints, and discuss concerns. In addition, many Virginia television stations have automated telephone answering systems that allow members of the public to provide news tips and other programming suggestions 24 hours per day, seven days per week.

The electronic environment in which stations and residents of the local community interact makes stations “virtually” accessible at all hours of the day or night and facilitates the

⁷⁹ 1998 Main Studio Order, ¶ 3.

exchange of information between stations and the public, which is critical to localism. The Internet has revolutionized the way humans interact and has led to a new era of intercommunication between stations and local residents. There certainly is no present crisis in station accessibility, and the *Notice* fails to make a convincing factual case to the contrary. Indeed, the *Notice* does not even try. The *Notice* cites nothing to contradict the Commission's conclusion in 1987 that there is "uncertainty" as to whether location of the main studio in the community of license increases licensee/community interaction.⁸⁰ Given the ease in today's world of electronic communication and the concomitant accessibility of stations, it is difficult to imagine how the location of the brick and mortar studio in the community of license would make so big a difference as to outweigh all of the costs and burdens that such a requirement would impose.

Transportation infrastructure continues to improve, although the ease of wireless and wireline communications (including the Internet) has made that consideration considerably less significant in this context.

2. Reversion to the Pre-1987 Rule Would Impose Substantial Economic Costs and Eviscerate the Benefits of Co-Location

Many stations, especially radio stations, have realized the benefits of co-location—benefits that were designed “to allow many more multistation licensees to combine the resources of their jointly-owned stations, which can allow them to better serve the public.”⁸¹ Many Virginia stations have realized the benefits of co-location and used the cost efficiencies to provide better service to their local communities:

⁸⁰ 1987 *Main Studio Order*, ¶ 12.

⁸¹ 1998 *Main Studio Order*, ¶ 7.

- According to Tidewater Communications, LLC, licensee of WAFX, the location of its main studio outside of its community of license (and co-located with co-owned WNOR and WJOI) has made it possible “to hire a better quality of staff and serve the general Hampton Roads Area with MUCH better coverage.”
- According to Monticello Media, LLC, the licensee of six radio stations in the Charlottesville area:

The best use of our cluster resources is realized because we have our entire operation co-located. We would not be able to do the things we’ve done if we had to split the operations. With our cluster we have invested a great deal in WCHV to provide local coverage, a forum for local issues of interest to the community and our most extensive news coverage. By doing this WCHV is the least profitable radio station in our operation but we have made the commitment to serve the community by providing different services with our various stations. . . . We knew when we purchased [the stations] that we were taking a bit of a gamble because of the long history of poor financial performance of these stations. If we had to add the financial burden associated with the localism initiatives the odds of the gamble would have been stacked against us.

- Three Rivers Media Corporation, licensee of WXBX, WYVE, and WLOY, observes that co-location of WXBX and WLOY (both licensed to Rural Retreat, Virginia) with WYVE in Wytheville has better served the public interest: “Our current location is beneficial to the public. Our location, 10 miles from [the community of license] is more accessible to the public. Members of the community stop by the studio daily for interviews, public service messages, and community events. Our convenient location has served the public well. Furthermore, our news coverage is diverse in the way that it has expanded [as a result of co-location] to include approximately five counties.”
- By locating its main studio approximately 21 miles away in Oxford, North Carolina, WLUS-FM (licensed to the border community of Clarksville, Virginia) is able “to tap a significantly larger base of . . . employees.” Location in Oxford has “made it possible for WLUS to offer programming and news coverage of a much higher caliber than would be possible with a studio located in Clarksville.”

Moreover, the cost of re-locating such co-located studios would be prohibitive. Many stations have long-term lease agreements for their current locations, and a rule requiring stations to re-locate studios to their communities of license would require lease breaches and/or lease buyouts, which represent costs that would be unfair to impose on broadcasters whose studios

were located in good faith compliance with the current rule. These costs are so significant that more than one hundred Members of Congress (including members of the Virginia delegation) sent a letter to Chairman Martin on April 15, 2008, expressing their concern over this very issue.

Below is a representative sample of the potential financial impact on Virginia broadcasters posed by the Commission's proposal:

- Tidewater Communications, LLC, whose studio for WAFX is located outside its small community of license, observes that the relocation "costs would be massive and, frankly, put us out of business."
- WFLO(AM) and WFLO-FM have studios located within a half-mile of their community of license. The licensee observes: "As far as cost involved in moving our studios into Farmville . . . it would be financially appalling. Rent for such a building would range from \$500 to \$1000 a month. We are a small market radio station and do not have such funds at our disposal. . . . The cost of moving our AM studios and FM studios to a new or rented facility would be cost prohibitive to say the least and could seriously affect our continued existence. Such a rule would close us (and a lot of small market stations) down and affect the employment of many people."
- Three Rivers Media Corporation estimates that the cost of relocating its WXBX and WLOY main studios from Wytheville to 10 miles down the road to Rural Retreat would be at least \$40,000, which would not include the costs of defaulting on the current lease. Aside from those unbudgeted costs, WXBX "has also begun the process of building a new transmitter building to house a new FM transmitter and a standby FM transmitter. Due to these budgeted costs, and the costs we have already incurred, it is virtually impossible for our station to relocate."
- The main studio for WLUS-FM, Clarksville, Virginia, is located in Oxford, North Carolina. The station moved to its current location in 2006 after spending more than \$206,000 on the purchase and renovation of a building and associated engineering expenses. A rule that would require WLUS-FM to move its main studio to Clarksville would undermine the station's relocation and cause it to devote capital to overhead expense rather than to programming.

At least one licensee, Real Media, Inc., has put on hold its plans to co-locate its two stations WRAR-FM and WNNT-FM because of the regulatory uncertainty generated by the Commission's main studio rule proposal. The communities of license of the two stations are separated by a distance of fewer than 10 miles, and the licensee was considering moving the

WNNT-FM main studio from Warsaw, Virginia, to Tappahannock, Virginia, where WRAR-FM's studio is located. In fact, the licensee's co-location plans include the ongoing maintenance of the Warsaw studio so that it could serve as a backup facility in the event a disaster were to render the Tappahannock facility inoperable. The licensee would realize significant operating overhead and cost efficiencies by implementing its co-location plan, and the public would clearly benefit from the emergency "redundancy" represented by the licensee's plan. No rational argument can be made that the eight-mile change in the location of the WNNT-FM main studio would be so dramatic as to somehow undermine the public's accessibility to the station's main studio or otherwise affect the performance of the station. Indeed, there are numerous communities where residents must travel far in excess of 8 miles to get to a station's main studio even when it is located in the middle of the community. In the event the Commission were to adopt a rule requiring station main studios to be located within their communities of license, the Commission would need to "grandfather" studios that are currently located outside their communities of license, because of the costs associated with moving such studios.

In short, VAB strongly opposes revisions to the main studio rule and is deeply concerned that the inquiries made in the *Notice* about the main studio rule did not make reference to any waiver, exemption, or other "grandfathering" mechanism.

E. Reporting on Airplay Afforded Local Artists

The *Notice* seeks comment on whether broadcasters should be required to provide information to the Commission relating to (i) the airing of music and other performances of local artists and (ii) how stations compile their playlists. While the Commission stated that it would not mandate local artist airplay, the Commission indicated that it would use this information in evaluating a station's overall performance under localism at license renewal time. VAB

respectfully submits that the Commission should not adopt a requirement that stations provide data relating to local artist airplay not only because stations already provide access to the airwaves for local artists and performances, but also because the proposal is both unworkable as a practical matter and a *de facto* mandate that is likely to upset the delicate balance between the First Amendment and the FCC's programming rules as they have evolved to this time.⁸²

1. Virginia Broadcasters Already Provide Appropriate Access to the Airwaves for Local Artists

Many Virginia broadcasters embrace and feature performances by local artists on their stations. In addition to programming designed to provide local artists with airplay opportunities, Virginia broadcasters routinely play the music and other performances of local artists and performers on their stations in the course of normal broadcast operations. The small sampling below provides a representative list of relevant radio and television programming that provides opportunities for local artists.

- WSET-TV airs "Living in the Heart of Virginia," a locally produced program that features stories about people in Virginia. Reports have included stories about local artists and performances, including an Amherst County organ grinder. WSET-TV produced and aired a two-month long singing competition program open only to local artists.
- WLUS-FM airs locally produced weekly programs "The Homegrown Hour" and "Carolina Ocean Drive." The Homegrown Hour features music by local country artists residing within the seven-county coverage area of the station, and Carolina Ocean Drive is a beach music show that includes some local and regional artists.
- WFQX(FM) airs the locally produced show "11 O'Clock News," which features new music from local and national hard rock artists.
- WUSQ has featured local singer-songwriter Tom Sheppard on multiple occasions during the station's weekday lunchtime show.

⁸² See *Lutheran Church-Missouri Synod*, 141 F.3d at 353 ("It cannot seriously be argued that [a] screening device does not create a strong incentive to meet the numerical goals.").

- WXBX and WYVE in the normal course of business review and play local artists' CDs. The stations also encourage local artists to perform live on the air from the stations' studios.
- WSWV(AM) plays local artists in the normal course in rotation with other songs. The station also airs programming featuring local church choirs, quartets, and soloists.
- WSWV-FM airs a locally produced four-hour bluegrass program twice per week. This program receives and plays music from local bluegrass artists and airs live, in-studio performances by local bluegrass artists.
- WZRV airs locally produced music shows that feature local artists. "Valley of the Stars" typically features one or two local artists in the country, bluegrass, or jazz genres, including the broadcast of live, in-studio performances from local artists. "Shenandoah Conservatory Presents . . ." is a weekly concert series featuring students⁸³ and faculty from Virginia's own Shenandoah Conservatory.
- WDYL airs a local program on Sunday nights ("The Community Service") that features the music of local artists.
- WNOR airs a weekly hour-long local music show "Homegrown," which is designed to give local artists airplay and exposure. The show includes interviews with local artists.
- Numerous Virginia stations feature "performances" by local residents, including disc jockeys, show hosts, interviewees, and callers voicing opinions or providing "local color."
- WFLO(AM) and WFLO-FM have aired the music of local artists for as long as the stations have been on the air. The stations do not music, whether local artists or not, that does not fit the stations' formats.

The format of some Virginia stations is not conducive to local artist airplay, and the significance of this point cannot be overstated. For example, in the radio context, news talk and sports talk formats typically provide extremely limited opportunities for local artist airplay. Classic rock stations (which, by definition, do not "break" *new* artists) and some foreign

⁸³ It is unclear whether the Commission would consider a student who attends the nationally renowned Shenandoah Conservatory but who maintains legal residence in another state to meet the definition of a "local artist." This issue is discussed in greater detail below.

language stations do not have natural opportunities to play the music of local artists. An artist's residence in a station's community simply does not entitle that artist to airplay on a local station whose format is inconsistent with the musical work of that artist, and the Commission is forbidden from imposing such a mandate.

In addition, station location may inhibit the ability of stations to provide local artist airplay. Logic dictates that stations located in small communities and in remote areas will have more difficulty providing airplay for local artists than will stations located in Richmond or Charlottesville because the number of local artists on which to draw will be smaller. For example, the licensee of WHLF, South Boston, Virginia, observes that the "pool of local artists whose music is compatible with an Adult Contemporary format is, in South Boston and like-sized communities, tiny."

2. The Proposal Is Unworkable

In the *Notice*, the Commission "agree[s] with those commenters who express concern about the lack of access to the airwaves by local musicians" but makes no effort to define who constitutes a "local artist," what constitutes a "local performance," or what constitutes a "lack of access to the airwaves."⁸⁴ Expressions of concerns are no substitute for factual analysis. None of the key phrases employed by the Commission is capable of satisfactory definition, and for that reason alone, the Commission should move no further forward with the proposal to require stations to report on their airplay of local artists. Indeed, the Commission has been down this regulatory road before.

A couple of examples demonstrate why the phrase "local artist" is incapable of a definition that would be meaningful.

⁸⁴ *Notice*, ¶ 112.

Grammy winning artist Bruce Hornsby was born in Williamsburg, Virginia, attended the University of Richmond, and currently resides in Williamsburg.⁸⁵ As such, it would appear that Hornsby is the quintessential local artist.⁸⁶

Hornsby has received and continues to receive airplay on stations in Williamsburg, in the Hampton Roads region of Virginia, throughout the Commonwealth of Virginia, and nationwide. For a short period of time, Hornsby hosted a radio show called Brunch with Bruce on Williamsburg's own 92.3 The Tide. By Hornsby's own account, the show was not popular with listeners.⁸⁷

If the Commission were to adopt its proposal, Virginia broadcasters (and possibly broadcasters in other states) would need to know whether Bruce Hornsby counts as a local artist so that they could report the airplay. If Hornsby is a local artist, is he local only in Williamsburg? Only in the Hampton Roads area of Virginia? In Richmond since he attended college there? In every locale in Virginia? In nearby northeast counties of North Carolina? Throughout the entire Atlantic seaboard? Would Hornsby have counted as a local artist in Williamsburg during the time he lived in California or would he only have counted as a local artist in California during that period of time? Since Hornsby also attended college in Boston and Miami, would he now count as a local artist in Massachusetts and Florida?

⁸⁵ See http://en.wikipedia.org/wiki/Bruce_Hornsby.

⁸⁶ Hornsby's music enjoys airplay on stations throughout the country, so 92.3 The Tide's airplay of Hornsby's music (and the short-lived Brunch with Bruce program) would not address the Commission's "concern" about the lack of access to the airwaves by local artists, rendering the whole policy of questionable utility.

⁸⁷ See Michael Jon Khandelwal, *Live from Williamsburg*, HAMPTON ROADS MAGAZINE, at 88 (Mar./Apr. 2007) (quoting Hornsby stating: "I did a show a few times on the station called 'Brunch with Bruce,' but I think it was really unpopular because I was playing all this weird music I like that most people hate. 'Brunch with Bruce' has faded away, mercifully, but that's okay with me.").

Dave Matthews of Dave Matthews Band fame provides another example. Dave Matthews is strongly associated with Charlottesville, Virginia, because that is where his musical career began. However, Matthews did not grow up in Virginia, and he currently resides in Seattle, Washington (though he does own land near Scottsville, Virginia).⁸⁸ While Matthews' radio airplay may have waned in recent years, no one would argue that Dave Matthews has not had his fair share of radio airplay over the years. In light of the access that Matthews has had to the airwaves, does Dave Matthews qualify as a local artist? If so, is he local to Charlottesville? To Seattle? To Scottsville? To the entire Southeast region of the United States? To Westchester County, New York, where he lived for 5 years as a young child? If the Commission were to adopt its proposal to collect information from broadcasters about local artist airplay, stations would need to know if and where Dave Matthews would count as a local artist.

In addition to needing to know who counts as "local," stations would need to know who counts as an "artist." Presumably, all members of a band would count as an "artist," but who else involved in the production of a song, album, or television or radio show would count for purposes of this proposal? Does a song that is produced by a local denizen count as the performance of a local artist? If a song features a local resident who is a backing studio musician, would that count as the performance of a local artist? If a song was penned by a local artist but performed by a non-local recording artist, would that count? If a non-local recording artist's album artwork was created by a local graphic artist and a station promoted that fact on the air when music from that album was played, would that count? In order to respond completely to any information collection about the airplay of local artists, the Commission would need to provide guidance about what counts and what does not count for this purpose. Of

⁸⁸ See http://en.wikipedia.org/wiki/Dave_Matthews.

course, it would not be possible to foresee every permutation, which is why the proposal is administratively problematic.

3. The Commission Should Reject Any Proposal to Establish Any Additional Government Approved Categories of Broadcast Programming

In the *Notice*, the Commission in one breath disavows the adoption of a mandate that stations provide local artists with airplay but in the next breath proposes to collect information from stations about local artist access to the airwaves for use at license renewal time to evaluate stations' localism performance.⁸⁹ The use of such information at license renewal time would amount to a *de facto* requirement that stations provide local artists access to their airwaves. *Cf. Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353-54 (D.C. Cir. 1998) ("It cannot seriously be argued that this screening device does not create a strong incentive to meet the numerical goals. No rational firm—particularly one holding a government-issued license—welcomes a government audit. . . . [W]e do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. Any one of these techniques induces an employer to hire with an eye toward meeting the numerical target."). Those observations of the D.C. Circuit in the Equal Employment Opportunity context apply equally to the instant context, where First Amendment principles are at stake.

Indeed, the Commission earlier concluded that the public interest is better served by the audio and video programming marketplace. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 590 (1981) (affirming the Commission's decision not to regulate radio station formats and observing that "the Commission concluded that 'the market is the allocation mechanism of preference for entertainment formats, and . . . Commission supervision in this area will not be

⁸⁹ See *Notice*, ¶ 112.

conducive either to producing program diversity [or] satisfied radio listeners.”). There has been no factual predicate established that would support government dictation of what music or talk should be broadcast on the radio or what news or entertainment programming ought be broadcast on television.

III. Conclusion

VAB urges the Commission to recognize that the overwhelming evidence submitted in this proceeding (and further bolstered by the illustrative examples set forth herein) demonstrates that commitment to localism by broadcasters is as strong now as it ever has been. In light of the efforts made by Virginia broadcasters in furtherance of localism, which are similar in nature and quantity to the efforts made by broadcasters throughout the country, new regulation (or re-regulation) in the localism arena is unwarranted and represents a harmful intrusion on broadcaster flexibility to serve the public interest.

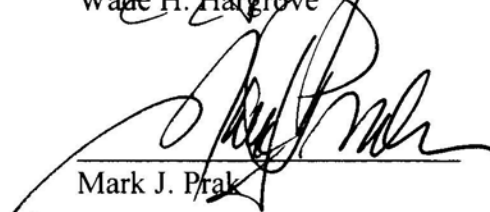
For the reasons stated above, we respectfully request that the Commission refrain from imposing the proposed new rules.

Respectfully submitted,

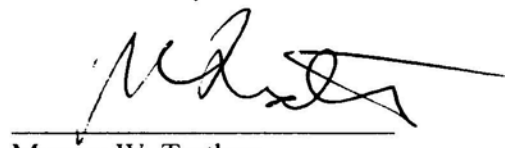
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BROADCASTERS**



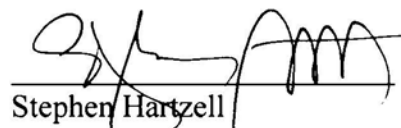
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Its Attorneys

April 28, 2008

Declaration of Stephen Hartzell

I, Stephen Hartzell, hereby declare, under penalty of perjury, as follows:

1. I am greater than eighteen years of age and am competent to make this Declaration.

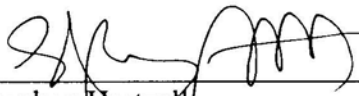
2. I am an attorney at Brooks, Pierce, McLendon, Humphrey, & Leonard, LLP, and I am the principal drafter of the comments filed by the Virginia Association of Broadcasters ("VAB") in the Broadcast Localism proceeding, MB Docket 04-233.

3. The quotations and summaries from VAB members referenced throughout VAB's comments are drawn directly from surveys completed by VAB members, which I reviewed. Those quotations and summaries are true and accurate accounts of the survey responses. All copies of surveys used in preparing these comments are on file with VAB.

4. In some instances, I communicated by telephone and/or email directly with survey respondents and other VAB members to obtain further information. All information from such communications referenced in the VAB comments is true and accurate.

I declare, under penalty of perjury, that the foregoing Declaration is true and accurate to the best of my knowledge, information, and belief.

4/28/08
Date


Stephen Hartzell